



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL REVISION NUMBER 158 OF 2016**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS....APPLICANT**

**VERSUS**

**JOHNSTONE MUTHAMA.....RESPONDENT**

(Being an application for the revision of an order in Milimani Criminal Case No. 917 of 2016 dated 28<sup>th</sup> July 2016).

**RULING**

**BACKGROUND**

The application was brought by way of a letter dated 11<sup>th</sup> August, 2016. The Applicant asked the court to invoke its supervisory jurisdiction over the subordinate courts pursuant to Section 362 of the Criminal Procedure Code by calling for and examining the record in the criminal proceedings in **Milimani Criminal Case 917 of 2016** and satisfy itself as to the propriety, correctness or legality of the findings and orders recorded or issued by the learned magistrate, Hon Andayi, Chief magistrate on 28<sup>th</sup> July, 2016 as well as to the regularity of the proceedings. The Applicant urged the court to particularly consider the fact that the trial magistrate made findings on Constitutional matters that do not fall within his jurisdiction. Further, the court was urged to examine the trial magistrate's reliance on Section 89(5) of the Criminal Procedure Code in dismissing the charges. The prayer was thus that this court sets aside the order dismissing the charge against the Respondent.

**Submissions**

The application was canvassed by way of filing written submissions with an opportunity to highlight them. Those of the Applicant were filed by learned Senior Assistant Director of Public Prosecutions, Mr. Omirera on 12<sup>th</sup> May, 2017 whilst those for the Respondent were filed by the firm of Soweto & Company on 14<sup>th</sup> June, 2017. Parties highlighted them on 18<sup>th</sup> July, 2017.

Counsel for the Applicant submitted that the trial magistrate lacked jurisdiction to deal with matters relating to the interpretation of the Constitution on protection of fundamental rights and freedoms of persons. He submitted that the trial magistrate had acted ultra vires of the jurisdiction conferred upon him when he found that the Respondent's fundamental rights had been infringed. He relied on **Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & 5 others[2012] eKLR** to buttress this submission.

Counsel then zeroed in on the application of Section 89(5) of the Criminal Procedure Code. He submitted

that the provision in question could only be applied before the commencement of proceedings in a matter. He submitted that it was beyond doubt that the charge in the present case was presented for registration on 17<sup>th</sup> June, 2016 and admitted by the magistrate. After the charge was admitted it was read out to the Respondent who pleaded not guilty. He submitted that the issue of the charge being defective that was subsequently raised by the Respondent's advocate was never brought up before the plea was entered. That it was therefore unlawful not only to entertain the submission at that point but for the court to proceed to dismiss the charge. According to Mr. Omirera, the only course of action that would legally have followed after the plea was taken was to substituted the charge under section 214 of the Criminal Procedure Code. He relied on **R. v. John Maina Mwangi[2014] eKLR** and **Hussein Khalid and 16 others v. Attorney General & 2 others[2014] eKLR** in this respect.

Counsel then submitted that the learned trial magistrate misdirected himself in upholding the Respondent's submission that the Applicant had abused his powers by indicating a wrong date in the charge sheet. According to the counsel proof of whether a date in the charge vitiated the trial could only be ascertained after adduction of evidence. Therefore, the charge was dismissed prematurely. Counsel urged the court to allow the orders sought accordingly.

Ms. Soweto who was assisted by learned counsel, Mr. Muchemi opposed the application primarily because nothing stood in the way of the prosecution bringing new charges against the Respondent. She submitted that the only reason that fresh charges had not been brought against her client was because the same would amount to an abuse of the court process. She submitted that the application was based on the misapprehension and disingenuous claim that the ruling in the lower court was premised on constitutional grounds. She submitted that the trial court's ruling was informed on the basis that had the charge against the Respondent been sustained, it would have been tantamount to abuse of the court's process. She submitted that the ruling, subject of the instant application could not be faulted as the trial court rightly and correctly applied the law and was in accordance with legion of High Court decisions which have upheld that where there's an abuse of the court process a court must purge itself of such proceedings. She submitted that the courts in their mandate to promote justice have a duty to stay and prohibit prosecutions that are brought for ulterior and extraneous considerations or prosecutions are pursued with manifest malice or without a factual basis. She relied on **Samuel Roro Gicheru & another v. O.C.S. Nanyuki Police Station & another[2014] eKLR**, **Peter George Anthony v Attorney General & another[2013] eKLR** and **R. v. Horseferry Road Magistrate's Court ex parte Bennett[1994] 1 AC 42** to buttress this submission. Counsel emphasized that the prosecution in this matter had been instituted with a view of persecuting the Respondent and was therefore rightfully dismissed. She relied on **R. v. Director of Public Prosecution & another ex parte Job Kigen Kangogo[2016]eKLR** to buttress this submission.

On the application of Section 89(5) of the Criminal Procedure Code M/s Soweto submitted that the charge sheet and the words therein constituting the particulars of the charge did not disclose an offence under Section 96 of the Penal Code and that the trial magistrate bore this in mind when he dismissed the charges. Furthermore, counsel for the Respondent moved the court for the dismissal of the charge at the commencement of the trial. She submitted that the court was therefore right in applying the provision in question in dismissing the charge.

She concluded by submitting that the lower court's ruling was not based only on one point but on the basis of the fact that the charge sheet was defective and that the prosecution was exhibiting an abuse of the process of the court.

### **Determination.**

I have accordingly considered the respective submissions. I have also examined the record of the lower court after which i find the following issues arise for determination:

- 1. Whether the trial court's ruling was based on a constitutional interpretation of which the learned magistrate had no jurisdiction to determine.*
- 2. Whether the court erred in its interpretation and application of Section 89(5) of the Criminal*

*Procedure Code.*

*3. Whether the prosecution amounted to an abuse of court process.*

On whether the learned magistrate had jurisdiction to determine a constitutional issue relating to the interpretation and protection of fundamental rights and freedoms, the Applicant was adamant that he exceeded his jurisdiction. On the part of the Respondent, it was submitted the magistrate did not err because his finding was rightfully premised on the fact that the Respondent's constitutional rights had been infringed as the charge was hinged on a defective charge sheet. Thus, the move by the Applicant to insist on sustaining the charge amounted to an abuse of the court process.

A closer look at the impugned ruling on page 6 paragraph two clearly shows that the learned magistrate made a finding that he lacked jurisdiction to adjudicate on matters relating to violation of a person's constitutional rights. He specifically cited the request by the Applicant to determine that the Respondent's right to a fair hearing under Article 50 of the Constitution had been violated. Referring to Article 165 of the Constitution, the learned magistrate held that jurisdiction to determine such an issue squarely lay with the High Court. He then penned off by stating that, **"I shall not make any finding on the same"**. And he proceeded to address himself on other issues raised by the parties. Consequently, I would not belabor to emphasize that that issue is rendered moot in this application. It ought not to have arisen, anyway.

I now delve on the application of Section 89(5) of the Criminal Procedure Code. The same provides:

***89(5) Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.***

This provision in no uncertain terms deals with the powers of a magistrate to refuse to admit a charge when it is initially presented to him. And of course this applies in instances before the plea is taken. It confers a magistrate with the powers, on his own volition (*suo moto*) to reject the charge at that point, if in his opinion, it does not disclose an offence. After the plea is taken, the magistrate can no longer exercise this discretion under the provision to reject the charge as redress would fall under other provisions of the law. The provision was also interpreted persuasively by Ngaah Jairus, J. in **Republic v. John Maina Mwangi**(*supra*), thus:

***"This provision of the law enables the magistrate to move suo moto to reject a complaint or a formal charge where it does not disclose an offence; this power can only be exercised by a magistrate before the charge is read to the accused person; once the charge has been read to the accused and he has taken plea, there is no way the magistrate can then refuse to admit the complaint because at that stage of the proceedings the charge has already been admitted."***

In this matter the Respondent took plea on 17<sup>th</sup> June, 2016, pleading not guilty. The application for the dismissal of the charge sheet under Section 89(5) was made on 11<sup>th</sup> July, 2016, the Respondent stating that the prosecution against him was an abuse of the court process. Although his counsel went to great length in enunciating that this was supported by the fact that, *inter alia*, the Applicant was first brought to court before investigations were complete, the undisputed fact is that the application was made after the plea was taken. As such, the only recourse that was available to the court with regard to a defect in the charge sheet was to urge the prosecution to amend the charge sheet in question. I cannot belabor then to find and hold that the learned trial magistrate committed a grave error in dismissing the charge under Section 89(5) of the Criminal Procedure Code. He also wrongly interpreted the provision by holding that it applied at any stage of the hearing. This error ultimately amounted to an irregularity which can be corrected by way of a revision.

This aside, the learned trial magistrate went ahead and ruled that he did not only dismiss the charge by virtue of its defective nature but also because he was of the opinion that the prosecution in question amounted to an abuse of the court process. The elements that were cited constituting the abuse of the court process included, that the Respondent was taken to court when the charges were not ready, that he

was charged with events that took place in his absence and that he was charged with events that took place on 26<sup>th</sup> September, 2015 whereas in making the application to remand him in custody pending investigations the prosecution informed the court that the offence occurred on a different date other than 26<sup>th</sup> September, 2015.

In this court's view, the first element squarely falls under the question of process of a fair trial as envisaged under Article 50 of the Constitution of which the learned magistrate had already held he had no jurisdiction to determine. The 2<sup>nd</sup> and 3<sup>rd</sup> elements could only be determined upon adduction of evidence. I say so because an issue as to whether or not the evidence adduced supports a charge can only be determined or disproved by evidence. It follows then that the elements could not at all constitute grounds that warranted the dismissal of the charge sheet. I will revisit this argument in detail hereunder in this judgment in an attempt to demonstrate that none of these elements or any other submitted by the Applicant constituted an abuse of the court process.

There exists an avalanche of case law that defines what constitutes abuse of court process. I will cite a few of them. In **Hunter v. Chief Constable of the West Midlands Police**[1982] AC 529 it was held that:

*“It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.”*

In **Moevao v. Department of Labour**[1980] 1 NZLR 464, the court observed that;

*“The justification for staying a prosecution is that the court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this if it concludes from the conduct of the prosecutor in relation to the prosecution that the court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognized purposes of the administration of criminal justice and so constitutes an abuse of the process of the court.”*

In our local jurisdiction, Odunga J. in **Attorney General v. Attorney General for and on behalf of the Inspector General of Police & 3 others ex parte Thomas Nganga Munene**[2014] eKLR, delivered himself thus;

*“It is therefore clear that whereas the discretion given to the 3<sup>rd</sup> respondent [DPP] to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence..., the Court will not hesitate to bring such proceedings to a close.”*

This court acknowledges the unfettered discretion of the DPP under Article 157 (10) of the Constitution to conduct prosecution without the **“the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority”** However, under sub- Article (11), in exercising the powers conferred on him by the Constitution, the DPP **“shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid the abuse of the legal process.”** Needless to say then, the court can terminate criminal proceedings instituted by the DPP if it demonstrated that the proceedings were so instituted not to achieve the purpose of serving justice but

other ulterior or collateral purposes. I then pose the question; did the Respondent demonstrate the threshold that his prosecution was not intended to achieve the interest of the administration of justice?

In this case, the trial court found that its process was being abused due to the fact that the Respondent was charged in June 2016 with events that occurred on 26<sup>th</sup> September, 2015 for which he had already been arraigned in court and was out on bond. The trial magistrate held that this was vindicated by the date (26.9.2015) shown on the charge sheet that was presented when the Respondent took plea. He held that although the prosecution had acknowledged this mistake, no steps had been taken yet to correct the anomaly.

He also held that the chronology of events leading to the Respondent being charged further pointed to the prosecution abusing the court's process. These were that he was arraigned before the investigations were complete and was charged with events that took place in his absence. It is my candid view that these were issues that the learned magistrate could not discern by merely reading the charge sheet but had to be established by adduction of evidence. Furthermore, charging an accused before investigations are complete is a normal occurrence in the criminal justice process. The nature of a case may demand that the twenty four hours provided in the Constitution for holding an accused in remand before arraignment are not sufficient to complete investigations. It is also common knowledge that technical errors on a charge sheet such as dates can be corrected by amendments under Section 214 of the Criminal Procedure Code. This opportunity was not availed to the prosecution and they failed to advantage of it. Taking drastic remedy on such issues as the trial court did was erroneous, incorrect, irregular and did not serve the interests of criminal justice. This court can correct the irregularity in an application of this nature.

With regard to the fact that the prosecution related to an offence committed on the same date as that in criminal case **1689 of 2015**, it is trite that two offences can occur on the same date and be prosecuted separately. This is further illuminated when one considers the fact that the prosecution did indicate that they would look into the issue of consolidating the matters. Although the consolidation did not take place, both parties conceded that the other matter, **criminal case 1689 of 2015**, is the subject of an application in the High Court seeking the interpretation of Section 96(a) of the Penal Code. In the circumstances, it was right that the Applicant proceeded on separate prosecutions as a recourse, which in any way did not amount to an abuse of the process of the court.

The other element being seeking an order to hold the Respondent in custody for four days so as to complete investigations for an offence that occurred on 11<sup>th</sup> June, 2016 only to charge him with an offence that occurred in the year 2015 may raise an eye brow. However, it is not a conclusive pointer to an intention to abuse the process of the court. This is majorly because, although he ought to have been charged within the period of the commission of the offence, the delay in arraigning him in 2016 was not inordinate. It was also not demonstrated that the prosecution was done for an extraneous or ulterior motive. After all, it could only be demonstrated whether or not the offence had been committed after evidence was adduced. Furthermore, as I pointed out earlier, should this date have been an error, there was still ample time within which the charge sheet could be amended.

In all, I am not persuaded to find that the Applicant in any way abused its powers in charging the Respondent, the basis on which the trial court terminated the charge before it. More so, that the prosecution of the Respondent was actuated by malice on the part of the Applicant and it lacked factual basis.

In the result, I find the application by the Applicant merited and the same succeeds. I set aside the order of the learned magistrate, Hon. Andayi, CM issued in his ruling delivered on 28<sup>th</sup> July, 2016 dismissing the charge against the Respondent. I substitute it with an order that the charge sheet filed by the Applicant in Milimani Cr. Case No, 917 of 2016 is hereby reinstated. The trial should proceed as scheduled. The Respondent shall appear before the Chief Magistrate, Milimani on 6<sup>th</sup> October, 2017 for mention for purposes of taking a hearing date. The trial court file shall be forthwith remitted back to the court to facilitate execution of this order. Each party shall bear its own costs of this application.

**Dated and Delivered at Nairobi This 28<sup>th</sup> Day of September, 2017**

**G. W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

- 1. Mr. Muchemi for the Applicant.*
- 2. Miss Sigei for the Respondent.*